A

SASHIDARAN KV NAIR & ANOR

v.

ALLIANCE BANK MALAYSIA BHD

B

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 1-12-39-2004]
27 JUNE 2006

C ***CIVIL PROCEDURE:*** *Judgments and orders - Setting aside, application for - Time limit - Whether there was an inordinate delay - Whether application should be set aside in limine - Subordinate Courts Rules 1980, O. 29 r. 14*

D ***CIVIL PROCEDURE:*** *Writ of summons - Service - Irregularity - Service of re-amended summons - Whether irregular and ought to be set aside*

LIMITATION: *Accrual of cause of action - Contract - Service of amended summons - Whether time-barred - Limitation Act 1953, s. 6*

E

This was an appeal by the appellants/defendants against the decision of the learned Sessions Court judge dismissing with costs the defendants' notice of application dated 1 December 2003 ('the application') wherein the defendants had sought, *inter alia*: (i) F if necessary, an extension of time for filing the application; (ii) that the order of the court dated 10 May 2002 ('the May 2000 order') be set aside; (iii) that the re-amended summons and statement of claim (collectively 'the re-amended summons') and the service thereof be set aside; and (iv) that the default judgment G dated 1 August 2003 ('default judgment 3') be set aside. The plaintiff's claim against the defendants was based on a hire-purchase agreement ('the agreement') executed between the plaintiff as owner and the first defendant as hirer, with the second defendant being the guarantor. From the inception of the H agreement, the defendants had never made any payment of the instalments thereunder, resulting in the plaintiff bringing an action against the defendants.

The defendants submitted that: (a) they had not occasioned any I inordinate delay in filing the application; (b) the service of the plaintiff's re-amended summons on the defendants in 2002 was irregular, and so default judgment 3 should be set aside *ex debito justitiae*; and (c) the plaintiff's amended summons was dated 10

January 1996, and that on 3 April 2002 when the plaintiff's application was filed, the amended summons had not been served on the defendants, having lapsed on 9 January 1997, and was therefore time-barred as there was no extension of time.

Held (dismissing the appeal):

(1) The relevant factual background revealed that pursuant to the May 2000 order, service of the re-amended summons had been effected on the defendants on 8, 19 and 24 July 2004. The May 2000 order, being made *ex parte* or in the absence of the defendants, may only be set aside under O. 29 r. 14 Subordinate Courts Rules 1980 ('SCR'). The application was filed by the defendants and served on the plaintiff on 1 December 2003 *ie*, 16 months after 10 May 2002, thereby occasioning an inordinate delay of some 15 months, after taking into account the 30 days allowed under O. 29 r. 14 SCR. On the facts of the instant appeal, there was no explanation for the defendants' inordinate delay of 15 months. The defendants' application could not be considered on its merits and ought to be dismissed *in limine* (*Koperasi Belia Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd* and *Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd* folld). (paras 30 & 35)

(2) The plaintiff had served, on 8, 19 and 24 July 2002, the re-amended summons on the defendants, who pursuant to the May 2002 order were therefore deemed to have received it 10 days after the last date of service on 24 July 2002. Such service was, hence, regular service. There was no merit in the defendants' submission and default judgment 3 was a regular judgment. (paras 40 & 44)

(3) The plaintiff had on 2 September 1995 served the summons on the defendants who had on 7 November filed their defence, in which case time ceased to run against any of the parties herein. There was also no dispute that the plaintiff had brought the action, founded on a contract, before the expiration of the six years from the date on which the cause of action accrued, under s. 6 LA. There was, therefore, no question of the time running against the plaintiff's summons nor was it rendered time-barred. Thus, the defence of limitation under s. 6 LA was not available to the defendants. (paras 49 & 50)

Case(s) referred to:

Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC ***(refd)***

Koperasi Belia Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd [1998] 3 CLJ 335 CA ***(foll)***

Lee Kah Hong & Anor v. Teoh Tiang Guan & Anor [1971] 2 MLJ 223 ***(refd)***

Lepang Enterprise Sdn Bhd v. Goh Ah Lun [2001] 8 CLJ 392 HC ***(refd)***

Lim Wan Hooi v. Ismail Hassan [1965] 2 MLJ 101 ***(refd)***

Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd [2003] 4 CLJ 533 CA ***(foll)***

OCBC Bank (Malaysia) Bhd v. Unimasco Sdn Bhd & Ors [2004] 6 CLJ 484 HC ***(refd)***

Palaniappan Kotayan v. Universiti Pertanian Malaysia [1995] 1 CLJ 693 HC ***(refd)***

Sashidaran & Anor v. Magnum Finance Berhad [1998] 3 CLJ Supp 325 HC ***(refd)***

Tham Meng Fatt v. Utam Singh Omnibus Co Ltd [1982] CLJ 263; [1982] CLJ (Rep) 815 HC ***(refd)***

Tractors Malaysia (1982) Sdn Bhd v. Chiew Chong Huat & Ors [1999] 2 CLJ 51 HC ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:

Limitation Act 1953, ss. 6, 7(5)

Rules of the High Court 1980, O. 5 r. 8(2), O. 6 r. 7, O. 29 r. 14, O. 42 r. 13

Subordinate Courts Rules 1980, O. 15 r. 1(1)

For the plaintiff - Low Kiang Kiau; M/s Low & Lee
For the defendants - Ravinathan Muthiah; M/s Ravi Mutiah & Co

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Appeal

[1] This is an appeal by the appellants-defendants ("the defendants") against the decision of the learned sessions court judge who had on 24 June 2004 dismissed with costs the defendants' notice of application dated 1 December 2003 ("the application") wherein the defendants had sought, *inter alia*:

(1) If necessary, an extension of time for filing the application; A

(2) That the order of the court dated 10 May 2002 be set aside;

(3) That the re-amended summons and statement of claim (collectively "the re-amended summons") and the service thereof be set aside; and B

(4) That the default judgment dated 1 August 2003 ("default judgment 3") be set aside.

Factual Background C

[2] The factual background of this case is a reflection of its chequered history.

[3] The plaintiff's claim against the defendants is based on a hire-purchase agreement ("the agreement") executed between the plaintiff as owner and the first defendant as hirer while the second defendant is the guarantor. From the inception of the agreement, the defendants had never made any payment of the instalments thereunder. D

E

[4] Service of the plaintiff's summons and statement of claim (collectively "the summons") has been effected on the defendants by way of substituted service on 2 September 1995.

[5] On 7 November 1995, the defendants filed their defence. F

[6] The summons was amended and re-amended subsequently, under O. 15 r. 1 of the Subordinate Courts Rules 1980.

[7] A reference to an order and a rule hereinafter is a reference to that order and rule in the Subordinate Courts Rules 1980 unless otherwise stated or the context otherwise requires. G

[8] The plaintiff's amended summons containing the plaintiff's new name was served on the defendants. Hearing of the summons was fixed for 23 August 1997 but as the defendants were absent, judgment in default was entered against them ("default judgment 1"). H

[9] Defendants' solicitors then wrote to plaintiff's solicitors stating that they represented the defendants and requested that default judgment 1 be set aside by consent, to which the plaintiff's solicitors did not accede. Defendants' application to set aside default judgment 1 was dismissed by the sessions court but their appeal to the High Court was allowed. I

[10] On 27 February 1998, defendants' solicitors requested from plaintiff's solicitors the amended summons.

[11] On 7 June 1998, plaintiff's solicitors served the amended summons on the defendant's solicitors, who by then had refused to accept service thereof on the ground that they had no instructions to do so, although they were still on record as defendants' solicitors and had not discharged themselves.

[12] *Vide* letter dated 9 November 1998, the sessions court registrar informed the parties' respective solicitors herein that the case has been fixed for mention on 4 December 1998, to which the defendants' solicitors on record replied that they had no instructions to attend court on 4 December 1998.

[13] The defendants' solicitors were subsequently informed by the court below that the case has been fixed for hearing on 30 September 1999. As both the defendants and their solicitors on record were absent, judgment in default was obtained against the defendants ("default judgment 2").

[14] Despite being on record as defendants' solicitors, they refused to approve the draft order sent to them by plaintiff's solicitors.

[15] On 20 March 2001, defendants' solicitors, still on record as such, refiled a notice of appointment of solicitors, and also filed for the defendants a notice of application to set aside default judgment 2. This application was allowed by the sessions court, against which the plaintiff had lodged an appeal. The plaintiff then withdrew that appeal and informed the defendants' solicitors of the new mention date in the sessions court but the defendants' solicitors replied, stating that they had no instructions to act for the defendants although they have never discharged themselves.

[16] The plaintiff then made an application to amend the amended summons and for substituted service thereof. That application was served directly on the defendants as the defendants' solicitors continued to state that they had no instructions to act for the defendants, although still on record as such. That notice of application was fixed for hearing on 10 May 2002.

[17] On 10 May 2002, as neither the defendants nor the defendants' solicitors on record were present in court, the court allowed the plaintiff's application and made an order in terms thereof ("the May 2002 order"). Further mention of the plaintiff's summons was fixed for 22 August 2002.

[18] Pursuant to the May 2002 order, substituted service of the re-amended summons had been effected on the defendants by post, *via* the court notice board and in "The Star" newspaper on 8, 19 and 24 July 2002 respectively.

[19] The plaintiff's re-amended summons was then fixed for hearing on 11 December 2002, and plaintiff's solicitors *vide* letter dated 9 October 2002 and, although strictly not necessary, a notice by way of an advertisement in "The Star" newspaper dated 18 October 2002, informed the defendants of the new hearing date.

[20] On 11 December 2002, plaintiff's witnesses were present in the sessions court, but the judge was on emergency leave and the hearing was adjourned to 3 April 2003. Plaintiff's solicitors *vide* letter dated 10 February 2003 and the court *vide* letter dated 25 January 2003 to the defendants' address given by the defendants in the hire-purchase agreement and the guarantee respectively, had duly informed the defendants of the new hearing date i.e. 3 April 2003.

[21] The said letter of the plaintiff's solicitors had been returned with the endorsement "sudah pindah" (shifted).

[22] On 7 February 2003, the plaintiff's solicitors received an undated letter from the defendants at the same address at No. 267-C, Jalan Pelandok, Sin Hoe Garden 75150 Melaka (from which they have purportedly shifted) stating that they wished to act in person.

[23] On 3 April 2003, plaintiff's counsel and witnesses attended court but the defendants were absent. However, as the trial judge had been transferred, hearing was adjourned to 9 June 2003 which the plaintiff's solicitors had *vide* letter dated 4 April 2003 duly informed the defendants.

[24] On 9 June 2003, the plaintiff's counsel and witnesses attended court but the defendants were again absent. As there was no trial judge, hearing was fixed for 1 August 2003 and the plaintiff's solicitors had *vide* letter dated 10 June 2003 informed the defendants of this new hearing date.

[25] The plaintiff's counsel and witnesses attended court on 1 August 2003, but the defendants were absent, as a result of which judgment in default was entered against the defendants ("default judgment 3"). A sealed copy of default judgment 3 was served on the defendants *vide* letter dated 28 October 1993 by the plaintiff's solicitors. The defendants received the sealed order on 31 October 2003.

[26] On 1 December 2003, plaintiff's solicitors received from the defendants' solicitors a notice of appointment of solicitors. The defendants' solicitors, who were the same solicitors referred to in the entire factual background above, filed the application on the same date. The application was dismissed by the sessions court judge. Hence, this appeal before me.

Inordinate Delay

[27] It was submitted by learned counsel Mr. Ravinathan Muthiah for the defendants that the defendants had not occasioned any inordinate delay in filing the application.

[28] In response, plaintiff's learned counsel Mr. Low Kiang Kiau contended *inter alia* that there was inordinate delay on the part of the defendants in making and serving the application, relying on O. 29 r. 14; and *Koperasi Belia Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 CLJ 335 CA; and *Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd* [2003] 4 CLJ 533 CA.

[29] I shall now consider the inordinate delay issue.

[30] The relevant factual background above reveals that pursuant to the May 2002 order, service of the re-amended summons had been effected on the defendants on 8, 19 and 24 July 2004. The May 2002 order being made *ex parte* or in the absence of the defendants may only be set aside under O. 29 r. 14 which where relevant reads:

14 Where in these rules provisions are made for the setting aside ... of any order ..., a party intending to set aside ... such order ... must make his application to the court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order ...

(= O. 42 r. 13 of the Rules of the High Court 1980)

The application was filed by the defendants and served on the plaintiff on 1 December 2003 ie, 16 months after 10 May 2002, thereby occasioning an inordinate delay of some 15 months, after taking into account the 30 days allowed under O. 29 r. 14.

[31] As O. 29 r. 14 and O. 42 r. 13 of the Rules of the High Court 1980 contain equipollent provisions, judgments which illuminate the legal effect of O. 42 r. 13 are applicable *mutatis mutandis.*

[32] Order 42 r. 13 came up for decision by me in the first instance in *Koperasi Belia Nasional Bhd, supra,* where the sealed copy of the *ex parte* order was served on the appellant on 3 February 1994. Although the application to set aside the *ex parte* order was filed on 2 March 1994, ie, within 30 days under O. 42 r. 13, it was nevertheless served on the respondent on 28 March 1994 ie, an unexplained delay of 26 days beyond the 30-day period stipulated in O. 42 r. 13. I therefore dismissed the application with costs. My decision was unanimously affirmed by the Court of Appeal in *Koperasi Belia Nasional Bhd, supra.*

[33] The above Court of Appeal judgment was followed by another panel of the Court of Appeal in *Ng Han Seng, supra,* where the defendants' application to set aside the judgement in default of appearance was filed outside the time limit prescribed by O. 42 r. 13, in the absence of any explanation or any application for an extension of time to file the application. It was unanimously held that the merits of the defendants' application could not be considered and the application was dismissed in limine (per Nik Hashim JCA) (now FCJ) at p 536b-d).

[34] In *Tractors Malaysia (1982) Sdn Bhd v. Chiew Chong Huat & Ors* [1999] 2 CLJ 51, Richard Malanjum J (now FCJ) held, *inter alia,* that the exercise of judicial discretion should be strict when there is a delay in setting aside an order under O. 42 r. 13 as an indolent litigant must give an explanation for the delay. (See also my judgment in *OCBC Bank (Malaysia) Bhd v. Unimasco Sdn Bhd & 3 Ors* [2004] 6 CLJ 484).

[35] On the facts of the instant appeal, I am unable to find any explanation for the defendants' inordinate delay of 15 months. Following the above two weighty decisions of the Court of Appeal, and High Court decisions, I hold that the defendants' application could not be considered on its merits, and ought to be dismissed in limine.

[36] Be that as it may, for purposes of completeness I shall proceed to consider the defendants' appeal on its merits.

Service Of Re-amended Summons

[37] It was submitted for the defendants that service of the plaintiff's re-amended summons on the defendants in 2002 was irregular, and so default judgment 3 should be set aside *ex debito justitiae*, relying on *inter alia Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241 FC.

[38] The stand taken for the plaintiff was that service of the re-amended summons has been effected on the defendants pursuant to the May 2002 order.

[39] In my judgment, the answer to these submissions may be ascertained by reference to the relevant facts and documents.

[40] As narrated in the factual background above, on 8, 19 and 24 July 2002 the plaintiff has served the re-amended summons on the defendants who pursuant to the May 2002 order were therefore deemed to have received it 10 days after the last date of service on 24 July 2002. Such service is therefore regular service.

[41] I shall now consider the authorities cited for the defendants.

[42] In *Tuan Haji Ahmed Abdul Rahman, supra*, the defendant's success in the Federal Court in setting aside the judgment in default of appearance against him was based on the following grounds:

(1) procedural impropriety in the decision-making process of the judge as neither counsel had the opportunity of being heard; and

(2) the default judgment was uncertain and perplexing as to the amount of the interest the defendant would have to pay under the default judgment.

[43] A careful reading of the judgment of the Federal Court delivered by Edgar Joseph Jr FCJ (as he then was) clearly reveals that the validity of service of a re-amended summons on the defendant was not within the ambit and purview of the judgment.

[44] On the facts, I am unable to see any merit in the defendants' above submission. I hold that default judgment 3 is a regular judgment.

Limitation

[45] It was stressed for the defendants that the plaintiff's amended summons was dated 10 January 1996, and that on 3 April 2002 when the plaintiff's application was filed, the amended summons had not been served on the defendants, having lapsed on 9 January 1997, and was time-barred as there was no extension of time therefor. He cited:

(1) *Lim Wan Hooi v. Ismail bin Hassan* [1965] 2 MLJ 101;

(2) O. 5 r. 8(2) (= O. 6 r. 7 of the Rules of the High Court 1980);

(3) *Lepang Enterprise Sdn Bhd v. Goh Ah Lun* [2001] 8 CLJ 392;

(4) *Lee Kah Hong & Anor v. Teoh Tiang Guan & Anor* [1971] 2 MLJ 223; and

(5) *Sashidaran & Anor v. Magnum Finance Berhad* [1998] 3 CLJ Supp 325.

[46] For the plaintiff, it was contended that the defence of limitation under s. 6 of the Limitation Act 1953 is inapplicable, as the plaintiff's summons has in the first instance been brought within the time bar.

[47] Support was sought *inter alia* in:

(1) O. 15 r. 1(1);

(2) *Palaniappan a/l Kotayan v. Universiti Pertanian Malaysia* [1995] 1 CLJ 693 HC;

(3) *Tham Meng Fatt v. Utam Singh Omnibus Co Ltd* [1982] CLJ 263; [1982] CLJ (Rep) 815 HC; and

(4) *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC.

[48] In my judgment, the relevant facts of the case must be put in proper perspective so as to avoid any miscomprehension.

[49] The plaintiff has on 2 September 1995 served the summons on the defendants who had on 7 November 1995 filed their defence, in which case time ceased to run against any of the parties herein.

[50] There was also no dispute that the plaintiff has brought the action, founded on a contract, before the expiration of the six years from the date on which the cause of action accrued, under s. 6 of the Limitation Act 1953. There is therefore no question of the time running against the plaintiff's summons nor was it rendered time-barred. Hence, I am unable to see how the defence of limitation under s. 6 could be made available to the defendants.

[51] As alluded to above, the plaintiff's re-amended summons had been duly served on the defendant on 8, 19 and 24 July 2002, pursuant to the May 2002 order and default judgment 3 was obtained by the plaintiff thereafter.

[52] Under O. 15 r. 1(1), the court may at any stage of the proceedings allow the plaintiff to amend his summons, on such terms as to costs or otherwise as may be just.

[53] Order 5 r. 8(1) relied on by the defendants provides that for the purpose of service, a summons is valid in the first instance for 12 months from the date of its issue. A plain reading of the relevant portion of O. 15 r. 1(1) together with O. 5 r. 8(1) makes it abundantly clear to me that service of the summons must be effected within the said 12 months in 1995, and that the plaintiff before me has indeed complied therewith on 2 September 1995 within the same year the summons was filed in 1995, and the defendant had filed their defence on 7 November 1995.

[54] Further, the re-amendment was made in relation to the name of the plaintiff by substituting the successor-in-title and its new address. There was no amendment or re-amendment to the plaintiff's cause of action which remained unchanged since the commencement of this action in 1995.

[55] There are abundant authorities setting out a relatively liberal approach adopted by our courts in relation to the granting of leave to amend the plaintiff's claim.

[56] By way of illustration, in *Palaniappan, supra,* the defendant raised the ground of statute bar and objected to the plaintiff's fourth application to amend the statement of claim to include damages and/or reinstatement with all fringe benefits. Visu Sinnadurai J (as he then was) exercised the discretion to allow the amendment, holding that even if a new cause of action was introduced, the new facts were substantially the same facts as originally pleaded.

[57] Then the Supreme Court even went one step further in *Hock Hua Bank Bhd, supra,* through the majority judgment delivered by Abdul Hamid Ag LP (later CJ Malaysia), by holding that the court has the power to grant an amendment after the expiry of the limitation period notwithstanding that the effect of the amendment was to add or substitute a new cause of action, subject to the condition that the new cause of action must arise out of the same facts as the cause of action in respect of which relief had already been claimed.

[58] Where the writ had been filed within the time limit and the amendments were merely items in respect of special damages which the plaintiff had incurred, as in *Tham Meng Fatt, supra,* Ajaib Singh J (later SCJ) held that the amendments were not caught under the Limitation Act 1953 although the items were added after the limitation period.

[59] In relation to the lapse of a summons in the subordinate courts and the writ in the High Court, it is trite law that the summons or writ would only lapse if it has not been served during its validity period.

[60] Hence, in *Lim Wan Chooi, supra,* the plaintiff's application for renewal of the writ was filed on 9 November 1963 for damages in a motor vehicle accident in March 1961. The writ had not been served. In October 1964, the plaintiff applied for substituted service which was heard and granted on 23 November 1964. Hashim J (as he then was) dismissed the applicaltion for renewal of the writ as it was made after the expiration of 12 months from the date of the writ and as the claim had become barred by limitation.

[61] In *Lepang Enterprise, supra,* the relevant writ had not been served. There was an application for six consecutive extensions of twelve months each on the writ for the purpose of service. Mohamed Ghazali J (now JCA) held that the extensions had contravened O. 6 r. 7 of the Rules of the High Court 1980 and the plaintiff's claim had become barred by limitation.

[62] The writ in *Lee Kah Hong, supra,* had not been served on the second defendant there. The plaintiff applied for extension of the writ for six months to serve the writ. The relevant question was whether the court should exercise its discretion to extend the writ when it had expired and when the plea of limitation had accrued under s. 7(5) of the Limitation Act 1953. Syed Agil Barakbah J (later SCJ) gave the answer in the negative.

[63] Finally, the defendants in *Sashidaran & Anor, supra,* applied to set aside the judgment in default obtained against them. The defendants' ground was that the amended summons was not served on them as required by O. 15 r. 6. Augustine Paul J (now FCJ) set aside the default judgment. It needs to be noted that the issues in relation to the extension of the summons or the plea of limitation before me are totally different from that before his Lordship.

[64] Further, in all the authorities cited for the defendants, the fact patterns are readily distinguishable in that, as alluded to above, the writ or summons therein had never been served at all, while the plaintiff herein has served the summons on the defendants who had filed their defence.

Conclusion

[65] I am unable to find any merit in this appeal which is hereby dismissed with costs, with the result that the decision of the court below is accordingly affirmed.